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Supreme Court, U.S.
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Supreme Court of the United States

Asokkumar Pal, pro se

Petitioner

v.

Department of Commerce

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

SUPPLEMENTAL APPENDIX

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February 19, 2009

SUPPLEMANTAL APPENDIX

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SUPPLEMENTAL APPENDIX A

Decision of the Administrative Judge Merit Systems Protection Board (True Copy)

UNITED STATES OF AMERICA MERIT SYSTEMS PROTECTION BOARD WASHINGTON REGIONAL OFFICE

ASOKKUMAR PAL
Appellant,
v.
DEPARTMENT OF COMMERCE
Agency

DOCKER NUMBER
DC-0432-07-0158-1-2

DATE: July 27, 2007

John J. Rigby, Esquire, Arlington, Virginia, for the appellant.

Caitlin Riley, Esquire, Arlington, Virginia, for the agency.

BEFORE
Daniel Madden Turbitt
Administrative Judge

INITIAL DECISION

On March 29, 2007, Asokkumar Pal (the appellant) refiled appeal challenging an action of the Department of Commerce (the agency), which removed him from his GS-1220-15 position of Patent Review Quality Assurance Specialist at the agency's Patent and Trademark Office, Patent Quality Assurance, in Alexandria, Virginia, effective November 3, 2006. The Board has jurisdiction over this appeal under 5 U.S.C. § 4303(e). At the

appellant's request, a hearing was held in this matter.

Based on the following analysis and findings, the agency's action is AFFIRMED.

ANALYSIS AND FINDINGS

Background

The following facts are undisputed. The United States Patent and Trademark Office (PTO) is established as an agency of the United States, within the Department of Commerce. 5 U.S.C. § 1. The PTO is responsible for granting and issuing patents, registering trademarks, and disseminating to the public information with respect to patents and trademarks. 35 U.S.C. § 2(a).

The appellant began his employment with the PTO as a Patent Examiner on September 20, 1981, as a GS-1224-09, step 1. Appeal File (AF), Tab 8, Subtab 4u. The agency promoted the appellant as follows: (1) on October 3, 1982, to a GS-1224-11, step 1; (2) on October 16, 1983, to GS-1224-12, step 1; (3) on October 28, 1984, to GS-1224-13; and (4) on December 21, 1986 to a GS-1224-14, step 1. AF, Tab 8, Subtabs 4t, 4s, 4r, and 4q. Effective February 16, 1997, the appellant was selected as a Patentability Review Examiner, GS-1220-15, step 5. *See id.*, Subtab 4n. On January 12, 2003, he was reassigned to the position of Patent Examiner, GS-1224-15, step 7, in the Office of Patent Quality Review (OPQA). *See id.*, Subtab 4m.

At all times relevant to this appeal, the appellant was employed as a Patent Examiner, Review Quality Assurance Specialist (RQAS), GS-1220-15, step 8.

See id., Subtab 4a. The appellant's duties as an RQAS consisted of reviewing the quality of patent examination work products produced by Patent Examiners and developing and giving training to address any needs for quality improvement. *See id.*, Subtabs 4j and 4l.

The appellant signed and acknowledged receipt of his Fiscal Year (FY) 2005 performance appraisal plan (PAP) on May 4, 2005. *See id.*, Subtab 4l. He also signed and acknowledged receipt of his FY 2006 PAP on December 8, 2005. *See id.*, Subtab 4j at 1.

The appellant's critical performance elements contained in both his FY 2005 and 2006 PAPs[1] were: (1) Quality Monitoring; (2) Production/Timeliness of Reviews; (3) Training; and (4) Effective Leadership of Quality Improvement. *See id.*, Subtabs 4j and 4l.

Diana L. Dudash became the appellant's first-level supervisor after mid-year of FY 2004. AF, Tab 8, Subtab 4l. She remained his first-level supervisor until the time of his removal. *See id.*, Subtab 4b. In FY 2006 and at the time of his removal, the appellant's second-level supervisor was Paula Hutzell, OPQA Director. *Id.* At 1. Hutzell reports to Deputy Commissioner for Patent Operations Margaret A. Focarino. On December 8, 2005, Hutzell gave the appellant a written warning that his performance for FY 2005 was "Unacceptable" in two critical elements, Quality Monitoring and

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[1] The performance appraisal system articulates written performance standards for PTO employees. A letter from the Office of Personnel Management (OPM) states that the system was approved by OPM. *See* Appeal File (AF), Tab 8, Subtab 4o-4p. In this case, the appellant is not contesting that the agency performance appraisal system was approved by OPM.

Training. AF, Subtab 4j. In the December 8, 2005 document, Hutzell informed the appellant that his performance improvement period (PIP) to demonstrate performance above the "Unacceptable" level would run December 11, 2005 to March 18, 2006. *Id.*

As a result of the "Unsatisfactory" rating, the appellant was placed on a PIP. The agency claimed that the appellant did not perform adequately during the PIP. The agency alleged that he made six errors and further claimed that these six errors were made in 16 cases that were reviewed by the appellant's supervisor. The appellant completed reviews of 139 cases during the entire PIP. During the PIP, Dudash provided the appellant with feedback concerning his work. AF, Subtab 4h at 15-16, 102-06, 235-38, 240-44, and 290. Hutzell also met with the appellant briefly on two occasions associated with the actions against him during her period as his second-level supervisor.

By letter dated august 3, 2006, Hutzell proposed to remove the appellant based on his "Unacceptable" performance in the critical element of Quality Monitoring during the PIP. AF, Subtab 4h. Hutzell claimed that the appellant's error rate at the end of his PIP was 37.5 percent. *Id.* At 2. She also set forth an explanation of the six errors he committed during the PIP. *Id.* The appellant replied both orally and in writing, to the notice of proposed removal. *See id.*, Subtabs 4e, 4f, and 4g.

On November 2, 2006, Focarino issued a Decision on the Proposed Removal, removing the appellant from Federal service, effective November 3, 2006. AF. Tab 8, Subtab 4b. The removal decision letter

was delivered to the appellant on November 3, 2006. *Id.* In the decision letter, Focarino found that while the appellant's performance in the critical element of Training had improved during the PIP, his performance in the critical element of Quality Monitoring did not, as his error rate of 37.5 percent was "Unacceptable." *Id.* At 2. Accordingly, Focarino removed the appellant, purportedly based on his alleged "Unacceptable" performance during the PIP in the critical element of Quality Monitoring. *Id.* This appeal followed. AF, Tab 1.

The agency must support its action by substantial evidence.

The Board will only sustain an agency's removal action taken under the authority of 5 U.S.C. Chapter 43 if is supported by substantial evidence. Substantial evidence is the degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree. 5 C.F.R. § 1201.56(c)(1). The agency has the burden of proving by substantial evidence that: (1) the action was taken under a performance appraisal system approved by the Office of Personnel Management (OPM); (2) the performance standards were valid; (3) the appellant's performance was deficient in at least one critical element as charged; and (4) the agency provided the appellant with a reasonable opportunity to demonstrate acceptable performance. *See Kadlec v. Department of the Army*, 49 M.S.P.R. 534, 539 (1991).

The agency has established by substantial evidence that OPM approved the agency's appraisal plan.

The fundamental basis of a Chapter 43 action is an OPM-approved performance appraisal. *See Griffin v. Department of the Army*, 23 M.S.R.P. 657, 662 (1984). The parties stipulated that the agency's appraisal system has been approved by OPM.[2] Refiled Appeal File (RAF), Tab 12. The agency also submitted evidence to show that its performance plan has been evaluated and approved under OPM-approved system. *See* AF, Tab 8, Subtabs 4o-4p. Thus, I find that, at the time of the appellant's removal, the agency had an OPM-approved performance plan.

The agency has established that the performance standards were valid.

The agency is required to establish performance standards that will, to the maximum extent possible, permit an accurate evaluation of job performance on the basis of objective criteria related to the job. 5 U.S.C. § 4303(b)(1). Performance standards must be reasonable, adequate to inform the employee of the level of performance necessary to achieve a satisfactory or acceptable rating, and sufficient, given the circumstances, to permit accurate measurement of the employee's performance. *See Wilson v. Department of Health & Human Services*, 770 F.2d 1048, 1052 (Fed. Cir. 1985). The standards must be more or less objective depending on the job

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[2] *See* footnote 1, *supra*. A stipulation will satisfy a party's burden of proving the fact alleged. *See* 5 C.F.R. § 1201.63; *Swift v. Office of Personnel Management*, 48 M.S.P.R. 441, 445 (1991).

measured, but must be sufficiently specific to provide the employee a firm benchmark toward which he must aim his performance. *See Melnick v. Department of Housing & Urban Development*, 42 M.S.P.R. 93, 98-99 (1989), *aff'd*, 899 F.2d 1228 (Fed. Cir. 1990) (Table).

Similarly, the fact that performance standards may call for a certain amount of subjective judgment by the supervisor does not render them invalid especially where the appellant's position involves the type of professional judgment which is not susceptible to a mechanical rating system. *Neal v. Defense Logistics Agency*, 72 M.S.P.R. 158, 161-62 (1996); *Hsieh v. Defense Nuclear Agency*, 51 M.S.P.R. 521, 528 n.3 (1991), *aff'd*, 979 F.2d 217 (Fed. Cir. 1992)(Table).

One critical element is at issue in this appeal. The failure to perform in a single critical element is sufficient to sustain a charge of unacceptable performance under Chapter 43.

I have reviewed the performance standards in question, and I conclude that they are reasonable, adequate to inform the appellant of the level of performance necessary to achieve a satisfactory or acceptable rating, and sufficient, given the circumstances, to permit accurate measurement of his performance. In reaching this conclusion, I have reviewed the standards themselves. I also considered that the appellant is not claiming in this appeal that he did not understand his standards or that they were confusing to him. In addition, there does not appear to be any dispute that the performance standards were communicated to the appellant. I considered, moreover, stipulations and

evidence supporting the agency's assertion that the appellant's first and second level supervisors met with the appellant and sent him periodic e-mails to review the status of assignments and tasks during the PIP. RAF, Tab 12. Hence, I find that the appellant's performance standards permitted an accurate appraisal of his performance, based on objective criteria and that he was afforded adequate assistance. *See Goodwin v. Department of the Air Force*, 75 M.S.P.R. 204, 207-08 (1997); *Gjersvold v. Department of the Treasury*, 68 M.S.P.R. 331, 335-36 (1995).

The agency alleged that the appellant's performance in critical element 1 was deficient.

The critical element at issue, critical element 1, is titled "Quality Monitoring," and the objective of this element is to continuously improve the quality of the Technology Center examination process. AF, Tab 8, Subtab 4j at 4. The Quality Monitoring critical element measures the quality of how well a GS-15 RQAS reviews work performed by Patent Examiners and accounts for 35 percent of the total evaluation. *Id.* The major activities of the quality critical element for GS-15 RQAS are as follows:

1. Reviewing the level of quality of the [Technology Center], Group, and workgroup examination work process and on individual Examiner's work products. The reviews include any of Allowances, In-process Review cases and [Patent Cooperation Treaty] cases. Reviews of other cases as determined by management may be included.

2. Assessing the level of quality of the work product according to established standards.
3. Determining whether the work product being reviewed contains examination errors as determined by the established guidlelines [sic].
4. Making accurate determination of whether the errors found when conducting IPR reviews represent errors that are classified as "[In process examination deficiency]" type errors according to established guidelines.
5. Making accurate determinations of any patentability type errors found in Allowance reviews.
6. Completing [Office of Patent Quality Assurance] review forms based on individual case reviews.
7. Accurately and effectively providing feedback to the appropriate technology center based on the review findings.

AF, Tab 8, Subtab 4j at 4; Subtab 4l at 5.

Under the appellant's FY 2006 PAP, an RQAS' performance in the Quality Monitoring critical element is "Unacceptable" if, among other things, he has an error rate greater than 25 percent with respect to the accuracy of identifying errors in Patent Examiners' work.[3] *Id.* The error rate is determined by dividing the number of incorrect determinations of error or non-error by the total

[3] The error rate for Unacceptable performance in the 2005 PAP (greater than 30 percent) is different from the error rate in the 2006 PAP (greater than 25 percent).

number of cases reviewed by the Supervisory RQAS.[4] *Id.*

The criteria for evaluation in this critical element include the accuracy of reviews where an RQAS finds an error, called an "in process examination deficiency" or "IPED," as well as the accuracy of the reviews where the RQAS finds no error, called a "pass through." *Id.* The PAP states that a minimum of two pass through reviews per quarter will be considered for each RQAS. *Id.*

The agency rated the appellant's performance unacceptable in critical element 1 for several reasons. The PIP notice reflects that the appellant's performance was considered unacceptable because during FY 2005 he had an error rate at least 34%. The agency complained that the work products he submitted consistently required major revision because they were technically inadequate, incomplete or inaccurate, and lacked the content and clarity necessary to communicate the position of OPQA. Further, the agency asserted that, in numerous instances, the appellant's lack of cooperation with his supervisor and co-workers obstructed the successful completion of the work. *See Id.*

According to the PIP notice letter, in order for the appellant to reach the fully successful level under critical element 1, his error rate could not exceed 25%. He also was required to independently perform thorough and accurate quality review so that very few cases would be returned to him for revision. *See id.*

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[4] The PAP uses the acronym "QL," which stands for Quality Lead, the former title of what is now the Supervisory RQAS.

Hutzell provided great detail in the notice of proposed removal of the appellant's alleged performance problems under this critical element. In particular, she listed his performance errors on six cases. Hutzell noted, among other things, that the appellant's work products required major revisions because they were incomplete or inaccurate in content. She also wrote that he failed to apply adequate technical knowledge to complete his work. She described the work product he produced as being "technically inadequate." Hutzell also indicated that the appellant's lack of teamwork prevented him from satisfactorily completing his work. After reviewing a summary of appellant's cases, Hutzell concluded that the evidence clearly established that he failed the improvement period in the critical element of Quality Monitoring. AF, Tab 8, Subtab 4h.

The agency has met its burden of proving that the appellant's performance in critical element 1 was deficient as charged.

At the heating, both the agency and the appellant presented witnesses' testimony to support their conflicting views on whether the appellant's performance in critical element 1 was, or was not, acceptable. Diana L. Dudash testified that she has worked in the Federal government for 17 years. She said that she has been employed as a RQAS Supervisor since may 1, 2004. She has held several jobs at the PTO, including having been a Supervisor Patent Examiner. She also was a Patent Examiner for 10 years.[5]

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[5] A deposition transcript for Dudash is contained in the file at RAF, Tab 9, Appellant's Exhibit CC.

Dudash was the appellant's first-level supervisor. She described the functions of the OPQA, where she and the appellant worked. She indicated that the office reviews the work of Patent Examiners. She noted that Patent Examiners, who must have a degree in science or engineering, make conclusions about the issues in a case and resolve any problems concerning why an application is not currently patentable. OPQA then reviews the Patent Examiner's determinations on those matters. She said that the agency often tries to give the inventors the "benefit of the doubt." In fact, an applicant is given a second chance if his or her claim is rejected.

Dudash explained that GS-15 RQAS (or "Reviewers"), such as the appellant, occupy management positions. They, too, need to have a degree in science and engineering. She said that the four RQAS who work for her all review Patent Examiner's work products, including claims, specifications, office actions, drawings, and other material. An RQAS then looks at the OPQA's standards to see if there are any errors. If there are no issues raised, then the case is considered a "pass through." She explained that most cases are deemed "pass through" reviews. If, however, there is an issue because of an error, then the RQAS fills out a form, called an IPED page, for an "in process review," when a claim is not allowed (deemed not patentable). If there are any errors, then the OPQA usually sends the case back to the Technology Center. If a patent applicant's or an inventor's claim is rejected, it is because it does not comply with laws concerning utility or satisfy grounds.

Dudash said that she generally reviews only those cases where an issue has been raised on a claim. She does not review any "pass through" claims. Dudash reviews her staff's work, such as their fact checking and their analysis, to ensure they are making reasonable arguments. She sometimes has to strengthen a Reviewer's writing or argument so that the application and review will be successful. She assesses how well her reviewers are performing by looking at how much work or corrections she must do for them. From that, she gets a sense of whether she can trust them and whether they are making sound judgments. If an Reviewer needs to do several drafts of a routine write up, then this would be a factor that she might consider in evaluating his or her performance.

Dudash stated that Quality Monitoring is one of the critical elements for Reviewers. She reviews a "handful" of claims (at least two) for each Reviewer each quarter to ensure that they are performing adequately under the Quality Monitoring standard. Dudash makes an initial determination if there were any Reviewer errors in a case. She often checks her determinations with others to make sure that it is not just a difference in opinion. If there were many errors and it might affect an employee's rating, she would discuss the situation with her boss. When there is disagreement, RQAS have an opportunity to defend their position on a case and they may "go back and forth on rebuttals." If they reach an impasse, however, then the matter goes to her boss.

One of Dudash's goals is to reduce the variability of rates of error between different Reviewers. She wants to make sure that they all are applying the

same standards. She indicated that if a Reviewer consistently does not find a lot of errors on patentability, then it might mean that he or she is missing something in the review process.

Dudash was the appellant's supervisor throughout the PIP. She said most of her interaction with the appellant during the PIP was through e-mail correspondence and a few telephone calls. Although she primarily works at home, during the PIP, she was in office in an average of two or three days per week and she would come into the office to meet with the appellant. Ordinarily, she provides feedback to other Reviewers within two weeks. However, she generally tried to get back to the appellant within a few days to a week during the PIP. She believed that she provided him with a lot of feedback during the PIP, in order to assist him to improve.

Dudash indicated that the record evidence contains what work the appellant accomplished during the PIP. He reviewed 139 cases, of which 69 were allowances, during that time. Dudash said that she and a colleague, Anthony Caputa (a Supervisory RQAS), reviewed a random sampling of 16 cases that the appellant performed during this time period and they found he committed six errors from that group. She indicated that, in order to choose which cases she reviewed during the PIP, she would simply get a pencil and randomly point it at a case name on the list of cases he was assigned. RAF, Tab 9, Appellant's Exhibit Z.

Dudash described at length the errors the appellant made on several invention applications, including a hand juicer (11/044,913) (Tab 5a); a shower head (10/612,149) (Tab 5b); a quartz plate

(10/891,028) (Tab 5c); an extended release for an additive in a fuel system (10/640,364) (Tab 5d); a multi-layer package for batteries (10/724,596) (Tab 5e); and a copper casting mold (10/463,097) (Tab 5f). In each instance, Dudash disagreed with the appellant's decisions regarding whether there was an error or not. Dudash characterized the mistakes made by the applicant as "flawed," "obvious," and she remarked that it should have been simple for an engineer, such as the appellant, to notice them. She added that he sometimes ignored basic office policies, used poor judgment, and made "bad decisions." She also mentioned that the appellant's write ups at times were "confusing" or he "mischaracterized" what the claims were saying. She expected that a GS-15 employee such as the appellant should have understood the issues and treated them appropriately in these cases. AF, Tab 8, Subtabs 4e, 4h. Dudash pointed out that the appellant's errors were detailed in the proposal letter and that the agency supplied many exhibits to support its allegations of errors. AF, Tab 8, Subtab 4h.

Next, Dudash confirmed that she tried to counsel the appellant on how best to succeed during the PIP. She also encouraged him to talk to his peers if he had any doubts and to avoid working in isolation. Yet, in the end, Dudash believed that she was required to make "way too much revisions" on the appellant's work. She said she had to spend a lot of time sending "too many e-mails back and forth" to him and responding to his "undermining comments" concerning her opinions. Dudash conveyed her frustration about the appellant's work to Caputa.

Ultimately, Dudash concluded that she could no longer trust the appellant's decisions as a Reviewer.

Anthony C. Caputa testified that he is a Supervisory RQAS. He has many years of experience working in several different jobs at the agency. For example, he was a Supervisory Patent Examiner from 1998-2005 and a Patent Examiner from 1993-98. Caputa confirmed that he has taught at the Patent Academy and that some people might consider this to mean he is held in high regard at the PTO. As an RQAS, Caputa reviews his own Reviewers' cases. He estimated that he reviews two of his staff's cases per quarter, which he randomly selects.

Caputa reviewed some of the appellant's work during the PIP after Dudash wrote him and asked him to become involved. *See* RAF, Tab 9, Appellant's Exhibit Z. At first, he recalled looking at "at least one" of the appellant's cases, and he was not sure if he reviewed more than that. Later, he remembered having reviewed about two to five of appellant's cases during the relevant time frame. Caputa could not recall how he determined which of the appellant's cases he should review. Dudash spoke with Caputa about the appellant's work and she showed Caputa a written summary of the results of the appellant's performance under critical element 1 during the PIP. *See* RAF, Tab 10, Appellant's Exhibit LL. Caputa explained that he and Dudash often used each other as "sounding boards" concerning work-related issues.[6]

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[6] Caputa's deposition transcript can be found in the file at RAF, Tab 10, Appellant's Exhibit GG.

Paula Hutzell, OPQA Director, testified that she was the appellant's second-level supervisor. As the current Director, she manages the overall operation of the office. Of the 56 employees in the office, 12 report to her directly.[7]

Hutzell was the proposing official in this case. She did not have a lot of direct contact with the appellant during the PIP. Dudash sometimes sent her e-mails apprising her of the appellant's work. *See* RAF, Tab 10, Appellant's Exhibits HH-JJ. Eventually, Dudash provided Hutzell with a summary of the work the appellant submitted during the PIP. *See id.*, Appellant's Exhibit MM. Hutzell made an independent review of that summary. After her review, she agreed with Dudash's assessment of the appellant's work. She did not see any improvement on the appellant's part during the PIP in the areas that were identified as needing improvement. She also felt that the appellant refused to cooperate with the supervisor. Hutzell reviewed e-mail traffic between the appellant and Dudash, and the feedback from Caputa and David Lacey, who both concurred with Dudash's assessment of all six errors in the appellant's work during the PIP. Hutzell stated that she, too, agreed with Dudash's opinion on these errors and she believed these errors were representative of others she had seen from him over the previous year.

Margaret A. Focarino testified that she is the Deputy Commissioner for Patent Operations. She was the deciding official in this matter. Focarino

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[7] Hutzell's deposition transcript is located in the file at RAF, Tab 9, Appellant's Exhibit BB.

had regular meetings with Hutzell about the appellant. In making her decision to remove, Focarino reviewed the notice of proposed removal and the oral and written replies to the proposal letter. *See* RAF, Tab 9, Appellant's Exhibit Y. She took notes of the oral reply meeting. *See id.*, Appellant's Exhibit X. She asked Steven Griffin, who was detailed to her office at the time, to review the errors outlined in the notice letter. She believed that Griffin had the requisite technical background to make a fair assessment of the facts presented.[8]

Steven P. Griffin is a Supervisory Patent Examiner. Griffin, at Focarino's behest, reviewed the six errors the appellant made during the PIP to see if they were reasonable. After spending about six to eight hours reviewing the errors, Griffin concluded that they were reasonable. Griffin said he also considered the comments and explanations the appellant made in his e-mail traffic with Dudash, but did not concur with the appellant's opinions contained therein. Griffin did not know if the six errors identified were representative of the appellant's overall work and he did not review the reply to the notice of proposed removal.[9]

George Elliot testified that he is the former Director of the OPQA. He was the appellant's former second-level supervisor and he signed the appellant's annual performance appraisal in 2004 and his mid-year performance review in 2005. Elliot had little direct involvement with the appellant

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[8] Focarino also was deposed during the processing of the appeal. *See* RAF, Tab 10, Appellant's Exhibit EE.

[9] Griffin's deposition transcript is contained at RAF, Tab 10, Appellant's Exhibit FF.

during that time. The appellant's first-level supervisor would have been more involved in looking at the appellant's performance back then. Elliot, though, believed that the appellant probably deserved the high ratings he received at that time. Elliot reviewed some of the materials the agency used in this case to discipline the appellant. Elliot stated that, based on his review, it appeared that Dudash found errors in the appellant's work and the appellant frequently refused to see Dudash's point of view concerning those mistakes.

Robert Hill testified that Dudash asked him to review two of the appellant's cases for her to see if he agreed with her position. Hill did not know if the work products he reviewed were done by the appellant when he was on a PIP. Hill said he agreed with Dudash in one instance and disagreed with her in the other. Hill said he previously reviewed the appellant's performance when he, Hill, was the appellant's supervisor. The appellant received a "Commendable" rating, which Hill considered overly "generous." Hill explained that because the appellant had been receiving "Outstanding" ratings for so long, management at the time decided it "should not go too fast" in giving him downgraded ratings.

Anthony MacFarlane testified that he has worked for the PTO for over 25 years in a variety of positions. He was a Supervisory Patent Examiner. MacFarlane has briefly and generally reviewed some of the appellant's work and he considered the appellant to be a technically competent individual. MacFarlane believed that the appellant was especially knowledgeable in the area of Chemical

Engineering. MacFarlane did not think that Dudash truly allowed any disagreement with her opinion. He could not recall one instance when she reversed herself after making an initial determination of error. Thus, MacFarlane did not feel that Reviewers under her authority were really provided with a right to appeal her decisions. MacFarlane also wrote Dudash and asked her questions regarding how she defined what constituted an error when she reviewed her staff's work. *See* RAF, tab 9, Appellant's Exhibit A.

The appellant, in his testimony, challenged the agency's claim that he had performance difficulties. He emphasized that he has received many "Outstanding" performance ratings during his 25-year history of Federal service and said that he had received numerous commendations and awards during his career. RAF, Tab 9, Appellant's Exhibit P. The appellant reviewed the agency's claims of error. He disagreed that these matters constituted clear errors and he believed that they merely represented his differences of opinion with Dudash, his supervisor. He admitted that he made mistakes and that there was room for improvement, which was true for everybody.

According to the appellant, Reviewers used to be able to talk directly to their Directors. However, after that the office policy changed, and the appellant instead had to talk with Dudash, who became his supervisor in 2004. Initially, he and Dudash got along well. However, she gradually began to try and enforce her own decisions on him, which he believed were at variance with the agency's Manual of Patent Examining Procedure. RAF, Tab

17 (Appellant's Hearing Exhibit No. 3). He also believed that Dudash was targeting him because his work was reviewed much more than other employees.

The agency provided the appellant with a reasonable opportunity to improve performance.

The agency must establish that it provided the appellant a reasonable time to improve his performance. The Board has held that employees have a substantive right to an improvement period before the institution of a performance-based action, and that the agency must show by substantial evidence that the employee was given a reasonable opportunity to improve his performance. *See Gjersvold v. Department of the Treasury*, 68 M.S.P.R. 331, 335 (1995).

It is uncontroverted that Dudash met many times with the appellant, and Hutzell met with him twice, to discuss the PIP and his work deficiencies. Dudash also informed the appellant of his performance problems in a steady stream of e-mails during the PIP. Dudash and Hutzell, moreover, provided convincing testimony that the appellant was advised frequently about his deficiencies and about how he could improve his work products. I find the testimony of Dudash and Hutzell on the appellant's performance deficiencies to be credible, straightforward, persuasive, and consistent with the voluminous documentary evidence of the record. *Hillen v. Department of the Army*, 35 M.S.O.R. 453, 458 (1987) (factors that an administrative judge considers when making credibility determination). Dudash's and Hutzell's testimony on the appellant's

performance deficiencies also described very specific and detailed instances of tasks that were poorly done and that he did not easily follow his supervisor's recommendations.[10] I find that Dudash's and Hutzell's testimony on this was supported by the testimony of Hill, who agreed that, from his perspective, the appellant's performance was something less than extraordinary.

I think it is extremely unfortunate that the agency could not have found another position for the appellant, who seems to have many talents and has been a successful Federal employee for most of his lengthy career. It is possible that reasonable persons could disagree on whether the appellant accomplished some of his tasks during the PIP satisfactorily. Nevertheless, the agency's burden of proof in a case such as this is not very high. Based on the documentary and testamentary evidence of the record, I find the agency established by substantial evidence that the opportunity period provided the appellant with a reasonable opportunity to improve his performance on critical element 1 and that he failed to do so. Accordingly, the agency has met its requisite burden of proof on these issues. *See Goodwin v. Department of the Air Force*, 75 M.S.R.P. 204, 208 (1997).

I find that the agency's evidence, consisting, *inter alia*, of its detailed documents and the credible

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[10] Kay Kim another former supervisor of the appellant's from May 10 through August 11, 2005, furnished an affidavit, in which she averred that, while she was temporary director of the office, she reviewed the appellant's work and he "seemed defensive and resistant to my suggestions and recommendations." RAF, Tab 9, Appellant's Exhibit U at p. 3.

testimony of Dudash, Hutzell, Caputa, Focarino, Griffin, and Hill, constitutes substantial evidence that the appellant's performance in critical element 1 was unacceptable during the PIP. *DePauw v. U.S. International Trade Commission*, 782 F.2d 1564, 1566-67 (Fed. Cir.), *cert. denied*, 479 U.S. 815 (1986). Therefore, I find that the agency has supported its charge of the appellant's unacceptable performance under this critical element.

The appellant bears the burden of proving his affirmative defenses by a preponderance of the evidence.

Notwithstanding my findings that the agency has supported its charge by preponderance evidence, the agency's action may not be sustained if he shows that the action was based on harmful error of a prohibited personnel practice. 5 U.S.C. § 7701(c). The appellant alleged that the agency, in taking the action, committed harmful error. He also claimed that the agency discriminated against him on the basis of his race (Indian), national origin (Indian), religion (Hindu), and age (over 40 years of age). In addition, he asserted that the agency retaliated against him for his prior equal opportunity (EEO) activity. The appellant bears the burden of proving these affirmative defenses by preponderant evidence. 5 C.F.R. § 1201.56(c)(3).

The appellant failed to establish that the agency committed harmful error.

The appellant argued that the agency's action was not in accordance with law and amounted to harmful error. In particular, he asserted that the agency

violated laws when it only reviewed 16 out of the 139 cases he finished during the PIP. That, he argued, was not a fair and adequate sampling. Likewise, he alleged that, when his supervisor reviewed a random sampling of his work, containing only work from the first half of the PIP, this could not have shown any possible improvement. RAF, Tabs 7, 11.

Harmful error under 5 U.S.C. § 7701(c)(2)(A) cannot be presumed; an agency error is harmful only where the record shows that the procedural error was likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. *See Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 681, 685 (1991).

I am not sure that the appellant's assertion here is appropriately considered as a harmful error allegation. In fact, his claim seems to constitute no more than a rehashing of his arguments against the merits of the charge of unacceptable performance. To that end, I find that the claim of harmful error is groundless. As I determined in my assessment of the documentary evidence, above, the agency carefully followed its procedures when it placed him on a PIP and then removed him.

That being said, the appellant, in support of his harmful error allegation, provided the testimony of Dhirendra N. Ghosh,[11] a survey/mathematical statistician, who stated that the sampling used to review the appellant's work during the PIP was "not significant enough." Ghosh hesitated to say what

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[11] Ghosh supplied a copy of his curriculum vitae. AF, tab 9, Appellant's Exhibit AA.

number of cases would be acceptable for a random sampling, but estimated it to be about 40-50 cases.

Ghosh stated that he did not approve of Dudash's "pencil to paper" methodology of randomly selecting the appellant's cases for reviews. Ghosh deemed the sample as "biased" because all of the appellant's work products reviewed were from the first half of the PIP. When Ghosh was informed that the parties stipulated that the appellant did not submit any work during the last half of the PIP, and that was the reason the samples were all taken from the first half, Ghosh dramatically changed his mind and stated that, if that was the case, then the work reviewed was more likely to be "statistically significant" for the first half of the PIP.

I can find no law, rule, or regulation that requires an agency to use a scientifically and statistically approved methodology to randomly choose work products reviewed during a PIP before it removes him for poor performance. In addition, under the facts of this case, it would have been difficult for the agency to choose a random sampling of cases from the second half of the PIP, inasmuch as the appellant did not produce any work product in the last six weeks of the PIP.

Even assuming the truth of the appellant's assertion that the agency's action was harmful, he has presented no evidence to show that this error would likely have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. Hence, I find that the appellant has not established that the agency committed error, that he has been harmed, or that the adverse action should be reversed. *See*

Kendricks v. Department of Veterans Affairs, 79 M.S.P.R. 510, 517 (1998); *Baracco v. Department of Transportation*, 15 M.S.P.R. 112, 123 (1983), *aff'd*, 735 F.2d 488 (Fed. Cir.), *cert. denied*, 469 U.S. 1018 (1984).

The appellant failed to establish his allegation of discrimination.

The appellant alleged that the agency discriminated against him based on his race (Indian), national origin (Indian), religion (Hindu), and age (over 40 years of age). RAF, Tab 15. the agency denied these allegations. *See id.*, Tab 16. To establish a claim of prohibited employment discrimination, the employee first must establish a *prima facie* case; the burden of going forward then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its action; and, finally, the employee must show that the agency's stated reason is merely a pretext for prohibited discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). In order to demonstrate a *prima facie* case of discrimination, the appellant is required to show that: (1) he is a member of a protected group; (2) he was similarly situated to an individual who was not a member of the protected group; and (3) he was treated disparately compared to the nonmember. *See Stenmark v. Department of Transportation*, 59 M.S.P.R. 462, 471 (1993).

I find that the appellant established that he is a member of a protected group, based on his race, national origin, religion, and age. Thus, he proved one element of a *prima facie* case. As support of his discrimination claim, the appellant testified that he

felt he had been singled out and targeted for discipline. I find, however, that the appellant failed to establish that he was similarly situated to any identified employee. *See Richard v. Department of Defense,* 66 M.S.P.R. 146, 153 (1995) (in order for comparison to be considered similarly situated, all relevant aspects of the appellant's situation must be nearly identical to those of the comparison employees). Also, Focarino, the deciding official, and Hutzell, the proposing official, categorically denied that the appellant's race, national origin, religion, or age played any factor whatsoever in their decisions. In fact, these two individuals stated that they were not even sure what the appellant's race, national origin, religion, or age were. Therefore, I find, based on my review of the evidence, that the appellant did not prove that he was discriminated against based on his race, national origin, religion, or age. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 515-16 (1993).

Moreover, even assuming that the appellant had established a *prima facie* case of race, national origin, religion, or age discrimination, I find that the agency articulated a legitimate, nondiscriminatory reason for its action, namely, the appellant's poor performance. The appellant has not shown that the agency's charge of poor performance was false or a pretext for race, national origin, religion, or age discrimination. Thus, I find that he failed to meet his burden of proving his affirmative defense of discrimination. *See Snell v. U.S. Postal Service*, 82 M.S.P.R. 674, 677 (1999); *Womack v. U.S. Postal Service*, 70 M.S.P.R. 285, 293, *aff'd*, 99 F.3d 1160 (Fed. Cir. 1996) (Table).

The appellant has not shown that the agency's action was taken in reprisal for his previous EEO activity.

The appellant contended that the agency's action was taken in reprisal for his previous EEO activity. To demonstrate reprisal, the appellant must show that: (1) he engaged in protected activity; (2) the proposing and/or deciding officials knew of this activity; (3) the adverse action under review could, under the circumstances, have been retaliation; and (4) there was a genuine nexus between the retaliation and action taken. *See Warren v. Department of the Army*, 804 F.2d 654, 656-58 (Fed. Cir. 1986); *McMillan v. Department of the Army*, 84 M.S.P.R. 476, 483 (1999). An employee's protected activity must be established by preponderance evidence to be the "motivating factor" or the "real factor" for the agency's decision. *See Gerlach v. Federal Trade Commission*, 9 M.S.P.R. 268, 274 (1981).

In the instant case, it is undisputed that the appellant filed previous EEO complaints against agency officials. In particular, the parties stipulated that the appellant engaged in protected activity by filing a formal EEO complaint in 2005, after he received an "Unsatisfactory" rating from Dudash and Hutzell. The rating is now the subject of a formal EEO complaint in EEOC Case No-570-2007-00188X (Agency Case No. 06-56-32). *See* AF, Tab 4, Exhibits A-H; *see also* RAF, Tab 12. However, Dudash testified that prior to the PIP and before she drafted the notice of proposed removal, she was unaware of the appellant's prior EEO activity. Focarino testified that she believed the appellant may have filed a

prior EEO complaint, but that this had no influence on her decision to remove.

Based on the above, I find that the appellant has not satisfied the first element of the reprisal test as to Dudash, but she [appellant, he] has as to Focarino. In any event, even assuming that both the proposing and deciding officials had known of the appellant's prior EEO activity and so the adverse action under review could, under the circumstances, have been retaliation, I still find that the appellant failed to establish the requisite nexus.

In order to determine whether the appellant has established nexus in a case involving retaliation for engaging in EEO activity, the Board must balance the intensity of the motive to retaliate against the gravity of the misconduct. *Dorsey v. Department of the Air Force*, 78 M.S.P.R. 439, 450 (1998). Here, other than the appellant's bare assertion that the action constituted retaliation, she [appellant, he] presented no direct evidence that her [appellant's, his] removal by retaliatory animus, nor was there sufficient circumstantial evidence to support a finding of genuine nexus between the alleged retaliation and the removal action. The proposing and deciding officials articulated legitimate reasons for taking the action against the appellant. They considered his performance deficiencies to be serious. They further noted that, despite efforts to try to assist the appellant to improve his performance, he continued to fail and he refused to cooperate with these efforts. Based on the record evidence, I find that the appellant has failed to show that his protected activity was the "motivating" or

"real factor" for the agency's decision to remove him. Consequently, this affirmative defense must fail.

The appellant's removal must be affirmed.

The agency's removal decision must be upheld once the Board determines the agency has met its burden of proof by demonstrating the appellant performed unacceptably in at least one critical element. *See Cook v. Equal Employment Opportunity Commission,* 50 M.S.P.R. 660, 662 (1991) (the Board may not mitigate a performance-based action). Here, because the agency proved by substantial evidence that the appellant performed unacceptably in a critical element of hid GS-15 Patent Review Quality Assurance Specialist position, the removal must be upheld.

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD: s/ Daniel Madden Turbitt
Administrative Judge

NOTICE TO PARTIES CONCERNING SETTLEMENT

The date that this initial decision becomes final, which is set forth below, is the last day that the administrative judge may vacate the initial decision in order to accept a settlement agreement into record. *See* 5 C.F.R. § 1201.112 (a)(5).

NOTICE TO APPELLANT

This initial decision will become final on AUG 31 2007, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more that 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. You must establish the date on which you received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Equal Employment Opportunity Commission (EEOC) or with a federal court. The paragraphs that follow tell you how and when to file with the Board, the EEOC, or the federal courts. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review submitted by electronic filing must comply with the regulations of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you claim that you received this decision more than 5 days after its issuance, you have the burden to prove to the Board the date of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or e-mail is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. If the petition is filed by e-mail, and the other party has elected e-Filing, including the party in the address portion of the e-mail constitutes a certificate of service.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION REVIEW

If you disagree with the Board's final decision on discrimination, you may obtain further administrative review by filing a petition with the EEOC no later than 30 calendar days after the date this initial decision becomes final. The address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 19848
Washington, D.C. 20036

JUDICIAL REVIEW

If you do not want to file a petition with the EEOC, you may ask for judicial review of both the discrimination and nondiscrimination issues by filing a civil action. If you are asserting a claim under the Civil Rights Act or under the Rehabilitation Act, you must file your appeal with the appropriate United States district court as provided in 42 U.S.C. § 2000e-5. If you file a civil action with the court, you must name the head of the agency as the defendant. *See* 42 U.S.C. § 2000e-16(c). To be timely, your civil action under the Civil Rights Act, 42 U.S.C. § 2000e-16(c) must be filed no later than 30 calendar days after the date this initial decision becomes final. If you are asserting a claim under the Age Discrimination in Employment Act, you claim must be filed with the appropriate United States district court as provided in 29 U.S.C. § 633a(c). In some, but not all districts you may have

up to 6 years to file such a civil action. *See* 28 U.S.C. § 2401(a).

If you choose not to contest the Board's decision on discrimination, you may ask for judicial review of the nondiscrimination issues by filing a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place. NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after this initial decision becomes final.

If you need further information about your rights to appeal this decision to court, you should refer o the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, http://fedcir.gov/contents.html. Of particular relevance is the court's "Guide for pro se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

SUPPLEMENTAL APPENDIX B

Amendment (Erratum) to the Initial Decision of the Administrative Judge Merit Systems Protection Board (True Copy)

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

ASOKKUMAR PAL
Appellant,
v.
DEPARTMENT OF COMMERCE
Agency

DOCKER NUMBER
DC-0432-07-0158-1-2

DATE: July 31, 2007

ERRATUM

Two pages from the initial decision, dated July 28, 2007, contained minor errors. Attached are: (1) the first two paragraphs from page 20 [page 25 in this True Copy]; and (2) the second full paragraph from page 23 [pages 29-30 in this True Copy], with the corrections noted.

FOR THE BOARD: s/ Daniel Madden Turbitt
Administrative Judge

Ghosh stated that he did not approve of Dudash's "pencil to paper" methodology of randomly selecting the appellant's cases for review. Ghosh deemed the sample as "biased" because all of the appellant's work products reviewed were from the first half of the PIP. When Ghosh was informed that the parties stipulated that the appellant, during the last half of the PIP, did not submit any work of the type that Dudash normally reviewed for GS-15 RQAS employees, and that was the reason the samples were all taken from the first half, Ghosh dramatically changed his mind and stated that, if that was the case, then the work reviewed was more likely to be "statistically significant" for the first half of the PIP.

I can find no law, rule, or regulation that requires an agency to use a scientifically and statistically approved methodology to randomly choose work products reviewed during a PIP before it removes him for poor performance. In addition, under the facts of this case, it would have been difficult for the agency to choose a random sampling of cases from the second half of the PIP, inasmuch as the appellant did not produce any work product of the kind that ordinarily warranted supervisory review in the last six weeks of the PIP.

[Appellant's note: These paragraphs, appearing in the initial decision at page 20, now appear at page 25, as the first and second full paragraphs in this True Copy.]

In order to determine whether the appellant has established nexus in a case involving retaliation for engaging in EEO activity, the Board must balance the intensity of the motive to retaliate against the gravity of the misconduct. *Dorsey v. Department of the Air Force*, 78 M.S.P.R. 439, 450 (1998). Here, other than the appellant's bare assertion that the action constituted retaliation, he presented no direct evidence that his removal was motivated by retaliatory animus, nor was there sufficient circumstantial evidence to support a finding of genuine nexus between the alleged retaliation and the removal action. The proposing and deciding officials articulated legitimate reasons for taking the action against the appellant. They considered his performance deficiencies to be serious. They further noted that, despite efforts to try to assist the appellant to improve his performance, he continued to fail and he refused to cooperate with these efforts. Based on the record evidence, I find that the appellant has failed to show that his protected activity was the "motivating" or "real factor" for the agency's decision to remove him. Consequently, this affirmative defense must fail.

[Appellant's note: This paragraph, appearing in the initial decision at page 23, now appears at pages 29-30, as the second paragraph in this True Copy.]

SUPPLEMENTAL APPENDIX C

Final Order
Merit Systems Protection Board
(True Copy)

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ASOKKUMAR PAL
Appellant,
v.
DEPARTMENT OF COMMERCE
Agency

DOCKER NUMBER
DC-0432-07-0158-1-2

DATE: February 6, 2008

John J. Rigby, Esquire, Arlington, Virginia, for the appellant.
Sonya Pass, Esquire, Arlington, Virginia, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of

review is found in Title 5 of the Code of Federal Regulation, section 1201.115 (5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d).* Therefore, we DENY the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

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* The appellant notes in his petition for review that the initial decision stated that the performance improvement plan required him to reach the "fully successful" level of not exceeding an error rate of 25%. Petition for Review File, Tab 1 at 28; Initial Decision at 8. However, the initial decision simply contains an error in language because the 25% error rate was the lowest acceptable performance level, "marginal," not the higher "fully successful" level. The agency properly held the appellant only to the lower "marginal" standard of a 25% error rate.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Code, Section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitles to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on other issues in your appeal. You must submit your request to the court at the following address:

United States Court of Appeals
For the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.usacourts.gov. Of particular relevance is

the court's "Guide for Pro Se Petitioners and Appellant," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD: s/ William D. Spencer
Clerk of the Board

Washington, D.C.